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Surprise Attack: Crime at Pearl Harbor and Now (Part II)

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This is the concluding portion of Judge Robinson's discussion of the Convention Relative to the Opening of Hostilities, signed at The Hague in 1907 (the "Third Hague Convention"), and its impact upon the 1948 Tokyo war crimes trial. Judge Robinson was United States counsel and naval legal officer in charge of the Pearl Harbor phase and other parts of the Tokyo trial. The first portion of his article appeared in the September issue of the *Journal*, beginning at page 973.

by James J. Robinson • ***Justice of the Supreme Court of the United Kingdom of Libya***

THE INTERNATIONAL Military Tribunal for the Far East was established by proclamation in January, 1946, by General Douglas MacArthur as Supreme Commander for the Allied Powers.[56] In the following month the General appointed to the court eleven judges from nominations made by the governments of the eleven participating nations and peoples.[57]

Prosecution counsel and staff, with a total of seventy-two lawyers, likewise were provided at Tokyo by the eleven countries.[58] Defense counsel consisted of seventy-nine Japanese lawyers and twenty-five experienced American defense lawyers. The latter were provided by the United States in response to a request made by the Japanese authorities to General MacArthur.[59]

The main court building was the former War Ministry building. It included parts of the former Japanese military academy. It was headquarters of Prime Minister—War Minister—General Tojo during the war. The building was near Asakusa Palace, a residence for royal guests which, with its extensive gardens, rivalled royal palaces of Europe. Nearby also were Meiji University, its impressive museum and its huge modern baseball stadium. At the stadium, many court personnel, especially American and Japanese, attended Japanese college championship baseball games during court recesses. Situated on a high hill, the court building commanded from its roof a distant view of snow-capped Mount Fuji to the westward, sometimes sharply outlined against the great red circle of the setting sun. To the eastward there was a far view of tall business buildings in downtown Tokyo, of the dome of the Diet (Parliament) Building, and of the Emperor's palace grounds surrounded by ancient moats.

IV
The Trial and the Sentences

The trial of the indictment, filed with the Tribunal in April, 1946, by the counsel representing the eleven countries, began on May 3, 1946, and ended with the completion of delivery of judgment and the sentencing of convicted defendants on November 12, 1948.[60] In the trial about 500 witnesses testified in open court. More than 5,000 documents were introduced in evidence. The transcript of the trial, which has not been printed, is about 50,000 pages in length, and the total record with exhibits exceeds 500,000 pages.

In the courtroom there were many dramatic incidents, which need not be narrated here. American Marine, Navy, Army and civilian survivors of Japanese Navy and Army atrocities, such as the Wake, Palawan, and Nicollet[61] massacres, testified about what they saw and heard and how they escaped these mass killings of their comrades. The evidence of these atrocity murders and the testimony of nationals of many other nations about hundreds of other violations of the laws of war fill many pages in the transcript and judgment. Some of the defendants chose to testify.

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56. Judgment, I.M.T.F.E., Annexes, page 16, Special Proclamation Establishment of I.M.T.F.E.

57. See Keenan and Brown, CRIMES AGAINST INTERNATIONAL LAW (1950) 28.

58. *Statistical Report of Secretary General*, I.M.T.F.E., Tokyo, 1948.

59. *Ibid.*

60. *Ibid.*

61. (Wake) Transcript, pages 14,911-967; 15,046. Judgment, pages 1,133-134. (Palawan) Judgment, page 1,040. (Nicollet) Judgment, page 1,074.

They and other defense witnesses testified at length in reply to prosecution evidence. Of the defendants who testified, former Foreign Minister Togo made a strong impression of integrity and independence of character. He showed rare courtroom courage when he testified in contradiction of Admiral Nagano and Admiral Shimada regarding their efforts to make the Pearl Harbor attack a total surprise attack, and their "threat" to him to keep him from so testifying against them at the trial.

Another defendant who testified, the former concurrent Prime Minister, War Minister and Commanding General Tojo, nicknamed "Razorbrain" by the Japanese, impressed one as the competent and sincere personification of Japanese militarism. In the days when the Japanese Foreign Office had been trying to deal with continuous protests by foreign nations against the Japanese militarist lawlessness, Tojo was reported to have summed up the situation by saying, "We [the Army] act; then we let the Foreign Office explain!"

We lawyers at the lectern, while addressing the bench or questioning witnesses, faced the eleven judges who had been appointed from the eleven countries whose flags were displayed from the high staffs that were massed behind the judges. In the central seat on the bench was the president, or Chief Justice, Webb of Australia. To the lawyer's right, in order from the president, were Judges Mei, of China; Zaryanov, of the Soviet Union; Bernard, of France; Northcroft, of New Zealand; and Jaranilla, of the Philippines. To the left in order were Judges Cramer, of the United States; Patrick, of Great Britain; McDougall, of Canada; Roling, of The Netherlands; and Pal, of India. All were in black robes except the American member and the Soviet member; they wore their Army uniforms with the stars of major generals.

A court is judged finally by the fairness, the truth and the law in the judgments which it hands down.

A judgment is to a case at law what a peace treaty is to a war. It is the end. It records the contest and the results. It lays down the determined facts. It makes changes of the past and present. It makes provisions for the future. It applies the dominant organized public force and governing principles of the law specifically to individuals and to groups of individuals even up to nations.

If the reader was in the courtroom at Tokyo on the afternoon of November 12, 1948, he saw and heard the president of the court, Chief Justice Webb, of Australia, finish reading the judgment of the court, as described above, and then sentence each of the defendants in accordance with the judgment. The chief justice had begun reading the 1,200-page judgment on November 4.

Facing the bench of judges and about forty feet across the courtroom were the twenty-five defendants. They were seated at two tiers of tables in their box enclosed by a low railing. Behind the defendants, covering much of the wall at the rear of the box, was a color chart of Pearl Harbor showing United States naval vessels as moored when attacked on December 7, 1941. The chart was there where I had introduced it in evidence during the trial. Military police of the United States Army were stationed in the box, at the entrances and elsewhere in the courtroom. In fairness it should be mentioned that the defendants conducted themselves throughout the trial with such order and dignity that they gave the police no difficulty whatever. In turn they were treated with due respect by prosecution counsel. There was the usual courtroom courtesy, with no act or word of personal indignity or vengeance.

Back of the visitors' section were several glass-enclosed booths for the interpreters. The booths were in two tiers or levels rising well up toward the high ceiling. In these booths the interpreters were making simultaneous interpretations of the spoken proceedings. Each person in the courtroom wore an IBM telephone headset. He could hear the amplified original proceedings—on this afternoon the chief judge reading in English—or, by turning a switch, he could hear the interpretation in Japanese or another language.

Judge Webb, delivering the judgment, read the court's verdict in the case of each defendant. In the verdict on Tojo, the judge read, as its conclusion, these words:

> He bears major responsibility for Japan's criminal attacks upon her neighbors. In this trial he defended all these attacks with hardihood, alleging . . . self-defense. [That plea] is wholly unfounded. The Tribunal finds Tojo guilty on Counts 1, 27, 29, 31, 32 and 33; and under Count 54; not guilty on Count 36 . . . no finding under Count 55.[62]

The guilty counts principally charged, as the crime, "conspiracy to wage aggressive war" and "waging aggressive war".

After a short recess, during which the defendants had been withdrawn from the courtroom as usual, each defendant was returned separately for sentence. To Tojo, standing for sentence in the defendant's box across the courtroom, Judge Webb said,

> Accused Tojo, Hideki, on the counts of the indictment on which you have been convicted, the International Military Tribunal for the Far East sentences you to death by hanging.[63]

Then Tojo, his face calm behind his round shell-rim glasses, bowed to the court with military precision, turned sharply and strode with the military police guard out through the rear doorway near the large wall chart of Pearl Harbor. For the last time he was leaving the courtroom which had once been part of his headquarters while he was military and political dictator of Japan.

The Tribunal sentenced seven defendants to death, sixteen to imprisonment for life, one to imprisonment for twenty years and one to imprisonment for seven years. The review by General MacArthur of the trial records and sentences, as provided by the charter of the Tribunal, did not result in changes in the death sentences. The seven condemned were executed on December 23, 1948.[64] With respect to the defendants sentenced to imprisonment, releases in due course and deaths have taken place since then so

62. Judgment, page 1,207.
63. Judgment, page 1,217.
64. Keenan and Brown, *op. cit.*, page 3.

that none of the defendants is now serving sentence.

No defendant was sentenced, and none had been indicted, for any act done in lawful obedience to a superior or in due performance of his military, naval or governmental duties. For example, Admiral Fukudome was not indicted although, as he says in a published article,[65] he was known to have been second only to the deceased chief planner, Admiral Yamamoto, in top Japanese naval planning for the Pearl Harbor attack.

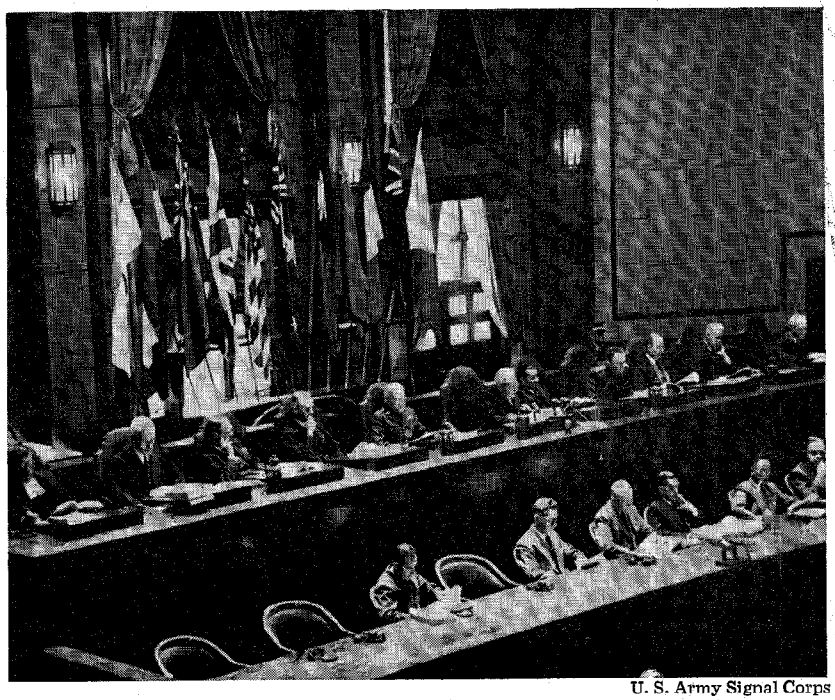
The tribunal and its work have received commendation and also some adverse criticism.[66] The comments will provide useful information for future court planners. The Soviet prosecution counsel Vasilyev has charged that the court permitted American defense counsel to delay the trial to an "unbelievable" degree.[67] He declares that the judges should have been more active in control of the trial and that they should have worked harder and with better organization to make the trial rapid as well as just. These criticisms appear to the writer not to tell the whole balanced story.

The Soviet lawyer, a competent lawyer like his colleague Dr. Golunsky, in spite of his criticisms concludes that "the court was able to reach a correct decision". He writes also:

> It is difficult to overemphasize the preventive significance of the sentence and its role in exterminating aggressive tendencies in the social and political life of an aggressive state. People who have suffered from aggression await impatiently the sentencing of those responsible for their sufferings.[68]

A final comment on the court and its work came from a group of respected and competent Japanese defense counsel. They called on me at the Imperial Hotel in Tokyo on a January morning in 1949 to say farewell. Their spokesman said,

"We are grateful for the war crimes trial. In the first place, the trial brought to us our first knowledge of the methods of our militarists in subverting our former constitutional government. We learned also about their atrocities. Secondly, the trial showed us how criminal trials are conducted in democratic countries. We saw how hard the court made you prosecutors work to carry the burden of proving the defendants guilty. In Japan the defendant has had the burden to prove himself not guilty. This situation will be different under our new Constitution and criminal code."



U. S. Army Signal Corps

Chief Justice Sir William Webb (top center) Australian member of the International Military Tribunal for the Far East and President of the court, reads the judgment of the court.

I replied that my three years of experience with Japanese lawyers and judges in the international trial and in Japanese courts had strengthened my belief that it would have been fortunate if there had been a Japanese judge on the International Tribunal for the trial. The legal result, I added, would no doubt have been the same, but there would have been equal justice in such a recognition of the legal ability and of the judicial impartiality of Japanese lawyers and judges.

V
The Judgment and the Law

What is the law in the judgment with respect to Hague III?

Hague Convention III was part of the legal foundation of fifty of the fifty-five counts in the indictment. In forty-five of these fifty counts defendants were charged with violating Hague III and other treaties. Hague III was the only statutory part of the legal foundation of the remaining five of the fifty counts. It was supplemented by the common law of war. In these five counts, one of which was the Pearl Harbor murder count previously referred to, certain defendants were charged with killing human beings by the surprise attacks which they caused to be made in violation of Hague III. The killings were charged therefore to be criminal killings constituting murder.[69]

The court did not reject this view. To reject the view would have been in effect to nullify Hague III. The court decided however to base the convictions of the defendants upon broader, all-inclusive counts, as in the Tojo

65. Fukudome, *op. cit.*, page 3.
66. Vasilyev, *Rapid Trial and Punishment of War Criminals (on Results of Tokyo Trials)*, Sovetskoye Gosudarstvo i Pravo (Soviet State and Law) March, 1949, pages 40-49.
67. *Ibid.*
68. *Ibid.*
69. The legal position is well presented by Lord Wright in New York Times, Letters to Editor, June 30, 1946. In the Judgment, page 36, the Court does not show full recognition of the point but instead includes "initiating" war under "waging" war. The point is developed in Robinson, *op. cit.*, note 43.

verdict, which charged that the defendants "waged wars of aggression". The court stated in its judgment that

> The waging of such wars [of aggression] is the major crime, since it involves untold killings, suffering and misery. No good purpose would be served by convicting any defendant of that major crime and also of "murder" *eo nomine*. Accordingly it is unnecessary for us to express a concluded opinion upon the exact extent of the obligation imposed by Hague Convention III of 1907. *It undoubtedly imposes the obligation of giving previous and explicit warning before hostilities are commenced...*[70] [Italics added.]

The judgment, therefore, expressly recognizes Hague III to be the law at this time, "undoubtedly" imposing the legal duty or legal obligation not to make a surprise attack. Furthermore, the court did not dismiss any one of the fifty counts that had Hague III as a statutory part of its legal foundation. On the contrary, the court dealt with these counts with full respect for Hague III as having legal standing and validity. The court, moreover, quotes with approval the statement in the Nuremberg judgment that it would be "unjust" not to punish those "who in defiance of treaties . . . have attacked neighboring states without warning..."[71]

Thirteen counts charging murder, including the five murder counts referred to above, were expressly left standing by the court as "unnecessary to determine".[72] The court said that by such action "we do not question the validity of the charges".

The court at Tokyo, like the court at Nuremberg,[73] based conviction principally on "waging aggressive war". Neither court defined that offense. Neither court based the offense exclusively on a certain treaty or treaties. With respect to Hague III and the Tokyo judgment, nevertheless, Hague III is recognized by the judgment as creating and forbidding the crime of surprise attack which the judgment includes in the offense of "waging aggressive war"; and the judgment includes killings committed in surprise attack in violation of Hague III as criminal killings—part of the "untold killings" involved in the offense of waging aggressive war.[74]

Lawyers in some instances have expressed regret that the Nuremberg and Tokyo courts did not base convictions on specific treaties such as Hague III, instead of relying broadly on the undefined offense of "waging aggressive war". Some critics assert that the Nuremberg court violated the *ex post facto* rule.[75] On the other hand, some writers on international law have supported the court and have predicted a useful future for the offense of "waging aggressive war", especially if it is codified. Efforts to define or to codify this offense have not yet been successful.[76] By contrast, Hague III, while subject to improvement as indicated in this paper, defines, forbids and as part of the law of war provides an individual penalty for surprise attack.

Why does the judgment not include a direct finding of guilt of the separate and independent crime of surprise attack as defined and forbidden by Hague III? The answer is that no count in the indictment charged this separate and independent crime; and the court could not make a finding of guilt of a crime not charged.

One of the proposed counts that might have been based on Hague III, using the words of the treaty law, would have charged in substance that:

> certain named defendants, Tojo, Shimada, and others, on December 7, 1941, at Pearl Harbor, Territory of Hawaii, unlawfully commenced hostilities and war by Japan against the United States, that is, the defendants, by the armed forces of Japan, unlawfully bombed, shot, burned, wounded and killed two thousand four hundred and three (2403) nationals of the United States, named in an attached bill of particulars, and unlawfully bombed, shot, burned and wounded an additional one thousand one hundred and seventy-eight (1178) nationals of the United States, named in an attached bill of particulars, and unlawfully bombed, burned, sank and otherwise damaged and destroyed ships, aircraft and other property of the United States and of its nationals, as described in an attached bill of particulars, without first having delivered to the United States Government a previous, explicit, warning, reasoned declaration of war, or an ultimatum with conditional declaration of war, contrary to Hague Convention III of 1907 and other provisions of the law of war and of nations.

Why was such a count not included in the indictment? One reason was the need for brevity. Another reason was an opinion of some draftsmen of the indictment that this charge of violating Hague III was in fact included as a basic part of other counts.[77] The legal adequacy of Hague III alone to support a separate count was not questioned by the lawyer draftsmen of the indictment, and as one of the draftsmen I proposed the inclusion of such a count, but I recognized the force of the two reasons causing exclusion, as stated above. The adequacy of such a count might be questioned principally by writers not taking the viewpoint of the criminal law.[78]

Difficulties and differences regarding statements of law and sentences in the judgment existed among members of the court, as shown by the fact that three of the eleven judges filed extensive dissenting opinions. Their difficulties do not require discussion here. The record offers useful experience for organizing a system for selection of judges for joint courts in the future.

70. Judgment, page 986.
71. Judgment, page 26.
72. *Ibid*, page 37. The statement by Fukudome, *op. cit.*, note 19, *supra*, that these thirteen murder counts were "dismissed" by the judgment unfortunately is an exact contradiction of the judgment.
73. The Court found twenty-three defendants guilty of waging aggressive war, twenty-two guilty of conspiracy to wage aggressive war, seven guilty of failing to uphold observance of the laws of war, and five guilty of ordering or permitting atrocities against prisoners of war.
74. Judgment, page 986.
75. Taft, *Equal Justice Under Law; The Heritage of the English-Speaking Peoples and Their Responsibility*, conference at Kenyon College (October, 1946) page 15. See Current, Secretary Stimson (1954) page 218.
76. See Harris, *op. cit.*, 555, 560, *passim* 514 *et seq.*
77. Judgment, pages 33; 987; 1,144.
78. "The Hague Treaty Number III is nothing but a bluff or simulacrum, and there is no need to respect such a childish treaty at the outbreak of a war in which the fate of a nation is at stake."—Japanese document introduced at trial. See Robinson, paper at The Hague (1948), note 43, *supra*, quoting other attacks on Hague III. The treaty has been attacked by some international law professors and text-writers. Professors Holland and Westlake in 1906 aggressively opposed the original proposal and draft at Ghent. Annuaire de l'Institut de Droit International, 1906, 272, 275, 279, 283, 285, 286, 292. Professor Renault, however, was a principal proponent of the treaty. For a recent criticism see McDougal and Feliciano, *Initiation of Coercion: A Multi-Temporal Analysis*, 52 Amer. Jour. International Law 241 (1958) at page 257, note 37: "The Convention [Hague III] is pointless insofar as the prevention of surprise attacks is concerned; for the period of time between the communication of the declaration or ultimatum and the beginning of hostilities was left undetermined, such that even an infinitesimal space of time would apparently satisfy the requirement of 'previous warning'". Citing Professors Hall and Westlake. But compare page 976, 977, above. The contrast between these general analyses and the criminal law analysis presented in this paper illustrates the difference in approach which this writer seeks to emphasize.

The judgment represents progress in the development of the law against surprise attack. It marks progress also toward the organization by many nations of joint judicial methods to strengthen their public security and to establish peace under law.

The Peace Palace at The Hague bears an inscription, *Pacis tutela apud judicem*—The safeguarding of peace is in the hands of the judge. Hague III, as a law designed to safeguard peace, may be considered, under all the circumstances and on the whole record from indictment to judgment, to have been in worthy judicial hands in the court at Tokyo.

VI

The Public Interest Served by Hague III and the Tokyo Trial

The Third Hague Convention of 1907 is useful as a criminal law which defines and forbids the crime of surprise attack. In this treaty the governments and peoples of forty-seven nations have united their public force in an alliance binding themselves not to make surprise attack against one another. More than fifty years have now passed since Russia led the other nations at Ghent and The Hague in drafting and enacting this law.

In the course of the half-century forty-four of the treaty nations have obeyed this law. Three of the treaty nations, Germany, Japan and the Soviet Union, have violated this law.[79] Eleven of the nations have been the victims of these violations, and eight of these victims have been small states. Three of the small state victims, Belgium, Luxembourg and Poland, have suffered two surprise attacks.

Hague III today is the chief specific weapon of the law against surprise attack. The treaty meets the requirements of sound criminal law as declared two centuries ago by Blackstone, —principles particularly sound for an international criminal statute:

> The criminal law should be founded upon principles that are permanent, uniform and universal; and always conformable to the dictates of truth and justice, the feelings of humanity and the indelible rights of mankind.[80]

U. S. Army Signal Corps

Hideki Tojo, former General, Premier and War Minister, in the witness box testifying in his own behalf before the International Military Tribunal for the Far East.

Although the treaty is both useful and sound, the question remains: why has it failed to prevent serious surprise attacks? Specifically, why did the Japanese violate Hague III at Pearl Harbor?

At the Tokyo trial the Japanese defense alleged reasons for the violation. One reason might be called a plea of confession and avoidance; that they had tried to deliver a declaration of war and that the so-called "declaration" was delayed by an alleged "accident" apparently suspected by Togo to have been deliberately planned.[81] The trial brought out conclusive reasons for rejecting this plea, as shown above.

Military necessity was another excuse given by certain Japanese for disregard of the treaty.[82] A plea of military necessity, as Hershey declares, is "a monstrous doctrine" leading to "international anarchy and is the negation of law..."[83]

The force of circumstances was suggested as a defense. This reasoning was based on the premises that Japan was menaced by subversion by international Communism, as shown in part by the Sorgé spy case; that Japan was menaced internally by military and civil disorders and economic suffering resulting from the world-wide depression of the early 1930's; that the political parties and constitutional government were not meeting this crisis; that Japan's policy in China was necessary for self-defense but that the United States was blocking this policy; and that Japan feared American naval expansion in the Pacific. This reasoning shows a necessity that nations unite in an effective system of organized justice in order to protect each other: first, from indirect subversion as well as direct aggression; second, from military dictators using the people's economic distress to get power;[84]

79. See notes 47 and 50.

80. 4 Blackstone, COMMENTARIES (1769) 2. See additional qualities of soundness as stated by Holmes, THE COMMON LAW (1881) 41, 49, 213: the treaty deals with "instincts" and "demands" of the people, and with "conditions of things manifest to the senses".

81. See Togo, *op. cit.*, pages 198, 208-222.

82. Fukudome, *op. cit.*, page 1,323.

83. Hershey, *op. cit.*, page 234 n.

84. Former Secretary Dulles pointed out that it was "the economic condition that brought Hitler and the Japanese war lords into power in the early 1930's". He suggests that serious interruption of international trade could likewise "precipitate World War III", unless peace is institutionalized "through processes of law and justice and enforcement thereof". Dulles, *The Institutionalizing of Peace*, PROCEEDINGS AMER. SOCY. INTERNATIONAL LAW, April, 1956, page 11.

and third, from groundless as distinguished from reasonable fears of surprise attack. The reasoning presents no legal defense, however, for stepping across the line drawn by Hague III and killing innocent peaceful human victims and making war on their nations without first having made the five-point declaration of war.

In fact, a dominant reason for the Japanese violation of Hague III at Pearl Harbor may be considered to have been the circumstance that no court had ever been set up to punish violators of the treaty. Defendants apparently decided to take the risk that no court would be set up to try them if they should violate Hague III and should lose the war. Their ally Hitler had recently been following the same reasoning, as he pointed out to them.[85] The basis of this reasoning must be recognized if law is to remove that basis.

The people of the forty-four nations that have not violated Hague III may well ask themselves the question: Why did it take thirty-nine years, seventeen violations of Hague III by three attacking nations against eleven victim nations, and two world wars commenced by violations of Hague III, before eleven nations activated the treaty by setting up a court?

A further question for all the nations that are parties to the treaty is this: Why, during the eleven years that have passed since the Tokyo trial, have the treaty nations taken no steps to provide for courts and otherwise to strengthen Hague III and related public security laws?

A great service of Hague III may be that it exemplifies so forcibly the fact that treaties and other laws, as Hamilton said, "are dead letters without courts".[86] But it shows also that with a court the treaty can perform an indispensable function.

An alternate member of the International Tribunal at Nuremberg, the late lamented Judge John J. Parker, wrote just before his death in March, 1958, that

> ... much bitter controversy would have been avoided and the results would have been more readily acceptable, certainly by the conquered nations, and possibly by the world at large, if the courts which conducted the trials had been set up by an existing international institution such as the International Court of Justice.[87]

There are several reasons for failure of the nations to establish a treaty court system, either in the thirty-nine years before the Tokyo court began to function or in the eleven years since it ceased to function. One reason, especially in the past eleven years, has been emergency pressures. Day-to-day emergencies and crises in international relations have interfered with the long-range planning necessary for strengthening the law against surprise attack.[88] Another reason has been the absence of any fixed responsibility for strengthening or, when necessary, enforcing, the treaty law.

A final reason for the neglect of Hague III and other public security laws has been the shortage of experienced personnel to do the necessary planning, drafting and liaison work. In particular, lawyers and judges of the United States and of other nations, especially those with experience in criminal law practice and adjudication, have not yet been mobilized for this service.[89] They have not yet had opportunity to assume constructive responsibilities in this field. The people of the United States, as Professor William E. Hocking and Editor Henry R. Luce respectively have pointed out, have been "timorous and unenterprising" in not using law as the "most effective and the most necessary means" for peace.[90] The people realize the necessity for using specialists and researchers in nuclear science; but they do not yet appear to realize the equal necessity for using experienced lawyer specialists and researchers in criminal law and court organization for effective nuclear controls.

What action is appropriate for ending failures by the nations to strengthen and to enforce Hague III?

The improvement of the treaty should be effected as a part of a precise and comprehensive criminal law plan and codification. It can not be effected as merely one political detail in a broad general plan for world peace. In order to make Hague III and related national security treaties effective, they must be fitted into a concise and simple system of criminal law having the three usual and necessary parts, namely, (1) a code of offenses and of procedure, (2) an organization for courts, and (3) a system of police or of other organized enforcement[91]. A modernized redraft of Hague III alone, or a single permanent international criminal court, or minor amendments of the present International Court of Justice would be inadequate.[92]

A first step, so far as the United States is concerned, appears to be legislation by Congress to provide for a national commission or an advisory committee or both. The legislation could be patterned or based in part upon the new law for a commission and advisory committee on international rules of judicial procedure.[93] The commission could well include members or former members of the diplomatic service, of the Armed Services, and of the Congress, and other national leaders, and specialists in international law and organization. The

85. Judgment, pages 1,140-1,141; 1,188. See Harris, *op. cit.*, ch. 13, *Alliance for Aggression*, pages 158-171.

86. Hamilton, THE FEDERALIST, No. 22 (1787). See also Dulles, *International Law and Individuals* 35 A.B.A.J. 912 (1949); and WAR AND PEACE 201-204.

87. Parker, *We Must Go Forward: Law in the World Community*, address prepared for U.N. League of Lawyers, March 18, 1958. CONGRESSIONAL RECORD, April 1, 1958; 44 A.B.A.J. 641 at 643 (1958).

88. See Bowie, *Analysis of Our Policy Machine*, NEW YORK TIMES MAGAZINE, March 9, 1958. The writer of this paper has received the same explanation from numerous dependable sources in two principal countries. See also Fenwick, *The Legal Aspects of Neutralism*, 51 AMER. JOUR. INT. LAW 71 (January, 1957).

89. See Luce, *Our Great Hope: Peace Is the Work of Justice*, 43 A.B.A.J. 407 (1957).

90. See Luce, *op. cit.*; see also Rhyne, *World Peace Through Law*, President's Address, and see White, BERNARD BARUCH: PORTRAIT OF A CITIZEN (1950) 134, 198. 44 A.B.A.J. 937 (1958).

91. See, for related proposals: Taft, A FOREIGN POLICY FOR AMERICANS, cited with approval by Dulles, *The Challenge of Our Time: Peace with Justice*, 39 A.B.A.J. 1063 at 1066 (December, 1953): Parker, *op. cit.*; Dulles, *The Institutionalizing of Peace*, *op. cit.*, page 13: Roosevelt, Theodore, letter of November 28, 1914, reprinted in Noyes, TWO WORLDS FOR MEMORY (1953) 111. See also Hamilton, THE FEDERALIST No. 22 (1787); see also Scott, JUDICIAL SETTLEMENT OF CONTROVERSIES BETWEEN STATES OF THE AMERICAN UNION (1919) 2-13; 537-43. For related suggestions see Winters, editorial, *The Federal Judiciary—A Model for World Court Organization*, 28 JOURNAL OF THE AMERICAN JUDICATURE SOCIETY, 67 (October, 1944). Warren, *The Law and the Future*, FORTUNE (November, 1955).

92. United Nations General Assembly by Resolution of December 12, 1950, established a committee on international criminal jurisdiction, which took extensive action. The American Bar Association in 1952 and 1953 debated the committee's proposed statute for a court. The project was not approved. See Appleman, MILITARY TRIBUNALS AND INTERNATIONAL CRIMES (1954) pages 363-372.

93. Public Law 85-906 (85th Cong. 2d Sess. H.R. 4642).

advisory committee to advise the Commission and the Congress, could be a technical committee of lawyers for research, drafting, conference and liaison with American and foreign lawyers, similar to the United States Supreme Court's former advisory committees on the Federal Rules of Criminal and of Civil Procedure.

The President of the United States has asserted objectives regarding surprise attack. His words may be used to summarize the usefulness of Hague III and the Tokyo trial. The President, speaking to the press at Washington on August 7, 1957, said

> If you can relieve the world of the great fear of surprise, devastating attack, then disarmament will follow step by step almost automatically... The essential thing is to get people working together for a peaceful purpose, trying to solve administrative or technical problems; then some kind of confidence could be established.[94]

The "great fear of surprise . . . attack" has been based since 1941 largely on the surprise attack at Pearl Harbor. If the Pearl Harbor attackers, like all previous surprise attackers, had been permitted to escape without having been made to answer to the law, the fear of the people would again have been aggravated by feelings of injustice, of helplessness and of despair.[95] By contrast, the trial and punishment of Japanese militarist-political leaders who caused that attack to be made have served to reduce that fear. Many people of many nations, moreover, by "working together" at The Hague and at Tokyo have shown that joint criminal laws and courts can and will bring law and order into this heretofore lawless jungle area of international life. Shall this progress be continued?

On Capitol Hill in Washington, the United States Supreme Court Building bears apt witness to a principle, to a technique and to a warning. These three testimonies, by due application, could end the world's fear and danger of nuclear surprise attack.

The principle stands out in the letters cut in white marble above the columns at the entrance of the building, *Equal Justice Under Law*. To make this ancient ideal principle effective as an international, universal principle of law and justice and peace, the nations and peoples need to join in equal legal partnership:

In drafting a brief code or penal sections of public security treaties;

In establishing a joint judiciary organization for providing courts and possibly arbitration commissions as needed to interpret and to apply the treaties; and

In organizing joint enforcement services and the common legal agencies and procedural devices, such as surety deposits and restraining orders, to uphold the courts and the treaties.[96]

The technique is the next testimony given by the Supreme Court Building.

From the building's massive bronze entrance doors the colonnaded corridor leads to two large conference rooms. Here lawyers and judges, as advisory committees under the authority and the direction of the Court and of the Congress, have applied the technique of research-and-conference on a nation-wide scale in organizing more efficiently the administration of "equal justice under law".

By a similar technique, lawyers in the United States, in each participating nation, and in the United Nations can give practical leadership on a world-wide scale in organizing more efficiently the administration of Hague III and other public security treaty laws.

The related technique of a court in action is to be seen in the nearby courtroom of the Supreme Court. Here justice under law is organized in a public agency to provide an impartial hearing, a dependable determination of appropriate facts and a responsible equal application of equal law. The international court in Tokyo, unlike this permanent high court of appeal, was an *ad hoc* criminal trial court. Nevertheless, judicial principles, ideals and even techniques hold much in common in all courts of justice whatever and wherever they may be. It is a truism that equal justice knows no single court nor country, no single race, religion, language, person, party, place nor time. Nor does any legal system have a monopoly of justice. At Tokyo, we lawyers of the Western nations, of Russia and of Japan recognized that the development of rival systems of justice may be a decisive international competition of the future; but that, with leadership, the competition might lead toward a composite allied legal order under treaty controls.

The warning is the third and final testimony given by the building. In its halls and rooms the building displays Air Raid Defense notices setting forth the alarm siren warning for surprise attack.

If and when the surprise attack warning signal—the long wailing blasts of the hundreds of air raid sirens—is raising the alarm on Capitol Hill, the Supreme Court Building may be near nuclear dissolution into clouds and ashes. Many other courthouses, the local operating bases of organized justice throughout the world, may then likewise be nearing nuclear dissolution. And this devastation would come largely because organized justice stops, but organized surprise attackers and their modern missiles do not stop, at legalistic pre-atomic boundary lines separating the nations.

If, on the other hand, the surprise attack warning signal is never heard on Capitol Hill or elsewhere, that result will doubtless be due largely to lawyers of the United States and their lawyer brethren throughout the world. Lawyers making competent use of precedents such as Hague III and the Tokyo trial will have organized law and order not only against surprise attack but also for the wider rule of law demanded by the modern atomic and space era.

94. President Eisenhower, statement to the press, Washington, August 7, 1957. THE TIMES (London, August 8, 1957) page 5, column 5.

95. See Noyes, THE EDGE OF THE ABYSS (1943) 65-70, and TWO WORLDS FOR MEMORY (1953) 111, 296; Charpentier, OU VA LA JUSTICE? *op. cit.*, 47, 56; Brierly, THE OUTLOOK FOR INTERNATIONAL LAW (1944) 50:—"The defeatist policy is accepted in international law alone." Churchill wrote in 1948 that World War II would have been "easy to stop" by "enforcement at any time till 1934 of the Disarmament Clauses" of the World War I peace treaty. Churchill, THE GATHERING STORM (1948) IV, 16.

96. The need and the present opportunity for "equal legal partnership" between the older nations and the newer nations, in respect both to rights and to duties, is stressed by: Luce, *op. cit.*, page 408, "Justice is the operative word among these new nations"; by Marsh, secretary-general, International Commission of Jurists, NEWSLETTER, June, 1958, page 2, pointing out strong feeling in new Asian countries of neglect by the older countries in legal problems; and by Churchill in his Guildhall address, July 31, 43 A.B.A.J. (October, 1957) 914, saying, "Justice knows no frontiers", but "Justice cannot be a hit-or-miss system", and international laws must be obeyed by all nations equally, with particular reference to nations participating in the United Nations.